United States Court of Appeals

for the Second Circuit

PETITION FOR REHEARING EN BANC

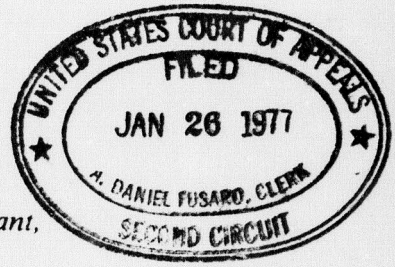
76-7172

ORIGINAL

In The

United States Court of Appeals

For The Second Circuit



In the Matter of the Application of

WALTER J. MEYER,

Plaintiff-Appellant,

-against-

LOUIS J. FRANK, Commissioner of Police, Nassau County Police Department, and CHRISTOPHER QUINN, Trial Commissioner and Inspector, Nassau County Police Department.

Defendants-Appellees.

B

B/S

SUGGESTION FOR REHEARING IN BANC

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TABLE OF CITATIONS

CASES CITED:

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I. PRELIMINARY STATEMENT

Walter J. Meyer, plaintiff-appellant herein, respectfully suggests the appropriateness of a rehearing by the Court of Appeals in banc, pursuant to Rule 35 of the Federal Rules of Appellate Procedure, of the appeal from the Judgment of the District Court granting defendents' motion to dismiss the complaint on the ground that plaintiff's action was barred by the statute of limitations.

II. STATEMENT OF THE ISSUES PRESENTED

A. Does the proceeding involve a question of exceptional importance?

B. Do considerations of federalism, the overriding interest of providing a federal forum to redress federal constitutional rights independent of any remedy afforded by state law, and the desire to prevent unnecessary initiation of civil rights actions in the federal courts justify consideration of the issues presented in this appeal by the Court of Appeals in banc?

C. Does the ruling of the Fifth Circuit in Mizell

v. North Broward Hospital District, 427 F.2d 468 (5th Cir. 1970) and the decisions of the Second Circuit in Lombard v. Board of Educ., 502 F.2d 631 (2d Cir. 1974) and Kaiser v. Cahn, 510 F.2d 282 (2d Cir. 1974) justify rehearing in banc so as to secure or maintain uniformity of decisions?

III. STATEMENT OF THE CASE

In an opinion by Circuit Judge Timbers, in which Circuit Judge Smith joined, the Court held that

> the history of the instant litigation forecloses application here of the full force of the Fifth Circuits' reasoning

in Mizell, supra. The Court, however,

> intimidate(d) no opinion as to how we would rule in a case indistinguishable from Mizell.

The principal bases upon which the Court declined to apply the reasoning of Mizell were that Plaintiff did not restrict his Article 78 proceeding to claims grounded in state law and, therefore, did not reserve all federal claims for the federal courts; that by having raised cer-

tain federal claims in the state action the defendants were justified in assuming that any other federal claims had been abandoned; and, that plaintiff was at fault in failing to initiate his federal action more promptly after the New York Court of Appeals denied him leave to appeal.

Circuit Judge, Oakes, dissented, finding that since under the authority of Lombard v. Board of Educ., 502 F.2d 631 (2d Cir. 1974) the state and federal forums are, with regard to federal constitutional relief, mutually exclusive, plaintiff should not be faulted for reserving distinct federal civil rights claims for the federal courts. Judge Oakes found that the considerations set forth in Mizell, Lombard and Kaiser v. Cahn, 510 F.2d 282 (2d Cir. 1974) should apply to all federal claims not asserted in state court, regardless of whether other federal claims were asserted in the state action. Accordingly, the dissent indicated that it would follow the Fifth Circuit's ruling in Mizell, and toll the statute of limitations during the pursuit of state administrative and judicial remedies by an aggrieved local government employee for the purposes of a lated filed Civil Rights action.

IV. ARGUMENT

THE PARAMOUNT FEDERAL INTEREST HEREIN DEMANDS THAT THE FEDERAL STATUTE OF LIMITATIONS BE TOLLED DURING STATE ADMINISTRATIVE AND JUDICIAL ACTION, AND PRESENTS A QUESTION OF EXCEPTIONAL IMPORTANCE FOR CONSIDERATION OF THE COURT IN BANC

The Supreme Court's authoritative interpretation of the Civil Rights Act, 42, United States Code, Section 1983, in Monroe v. Pape, 365 U.S. 167 (1961) settled the issue regarding the independence and availability of a supplementary federal remedy to a state remedy.

In consideration of Monroe, the Court of Appeals has chosen not to follow Frazier v. East Baton Rouge School Bd., 363 F.2d 861 (5th Cir. 1966), which appeared to support the application of res judicate in a section 1983 action to a failure to raise a federal constitutional claim in the state court. Instead, the Court in Lombard, supra, expressly noting paramount policy considerations, permitted a litigant to raise federal claims in a section 1983 action which were not first sought and refused in the state court. The court merely held that a constitu-

tional claim actually raised in the state court, may not be reconsidered by a subsequent civil rights action.

These paramount policy considerations were again applied by the Second Circuit in Kaiser, supra, wherein it was held that federal, not state, law governs the question of when a claim for relief under the Civil Right Act accrues and when the statute of limitations applicable to such claim is tolled. The Court noted that it was constrained to apply its own standards relative to tolling, in the interest of protecting the federal interest sought to be enforced.

The Fifth Circuit in Mizell, supra, relied heavily on principles of federalism in tolling the statute of limitations during state court judicial action in order to encourage the utilization of state procedures to achieve state resolution of alleged wrongs under a state created cause of action before appealing to the federal courts for relief. This decision, the only one to date in any of the Circuits of the United States, would appear consonant with the principles of policy articulated in Lombard, Kaiser and Monroe.

Although the majority expressly intimated no opi-

nion as to how the Second Circuit would rule in a case indistinguishable from Mizell, the entire court was in agreement that Mizell remains good law in the Fifth Circuit, and that the Supreme Court's decision in Johnson v. Railway Express Agency, Inc., 421 U.S. 454 (1975) was not controlling, since considerations of federalism were not implicated therein and since the procedures under Section 1981 were intended to complement rather than supplement each other.

Thus, the issue on rehearing should be whether the reasons articulated by the majority for distinguishing Meyer's position from that of Mizell, justify a departure from or exception to the broad policy considerations found compelling to the courts in Lombard, Kaiser, Mizell and Monroe.

Firstly, as noted, Circuit Judge Timbers disapproved of Meyer's having raised certain federal constitutional rights to counsel and to confront witnesses in the state court, and then thereafter raising other, distinct, constitutional claims in a subsequent federal action. In Lombard, however, the Second Circuit expressly rejected the applicability of the doctrine of res judicata

or claim preclusion to a civil rights action. The Court went no further than stating that the same constitutional claim could not be raised in both the state and federal forum.

Meyer argued in state court that the defendants had arbitrarily and unreasonably deprived him of his right to counsel of his choosing, and to confront and cross examine witnesses, by failing to grant him a further adjournment of his administrative trial when his counsel was actually engaged. The action was decided pursuant to Section 75 of the New York Civil Service Law; pursuant to which it was held that the defendants had not acted arbitrarily or unreasonably in directing the hearing to proceed, since "there comes a point at which a hearing may no longer be deferred because one particular attorney is not available." (Appendix at 21a-22a). There was no discussion of constitutional principles, and no federal statute or other authority was cited. There was no opinion on appeal, in either the Appellate Division or the New York Court of Appeals.

Under the circumstances, it is clear that regard-

less of what claims were actually raised by Meyer in the state courts, federal rights were not considered, the claims raised in the instant proceeding were never suggested previously, and the action was determined upon purely state grounds or issues. Accordingly, Meyer has clearly not had "two bites at the cherry" proscribed in Lombard.

Secondly, Judge Timbers, held that by having raised certain federal claims in the state court, the defendants were justified in assuming that any other federal claims had been abandoned, and thus, the policy of repose warranted a dismissal of Meyer's action. However, had Meyer done that which was done in Burnett v. New York Central R.R., 380 U.S. 424 (1965) - that is, raise precisely the identical issues in two successive suits, and thus deny to defendants their reliance on the policy of repose - his action would have to be dismissed under Lombard. Accordingly, Meyer is condemned by the majority regradless of what he does. If he raises any federal claim in the state action the policy of repose inures to the defendants' benefit, and they may claim surprise by a subsequent federal action which raises different constitutional claims. However, it might similarly be argued that by failing to raise any federal claims until a civil rights action, which comes more than three years

after the accrual of the cause of action, there has been a "revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared," compelling dismissal under the same policy of repose. Order of Railroad Telegraphers v. Railway Express Agency, Inc., 321 U.S. 342, 348-49 (1944).

Meyer's only solution to this quandary of being faulted for raising distinct and separate federal claims in the state and subsequent federal action, would be to raise such distinct and separate claims in simultaneous state and federal actions. This, however, would be the antithesis of federalism, and would result in the multiplicity of suits in the federal courts seeking the exact same relief, but on distinct grounds, as concomitant state actions - precisely the opposite to that which is desirable and the teachings of Monroe.

It can also be noted that the Court has overlooked Meyer's petition of January 15, 1974 to defendants seeking rehearing and reconsideration of the determination dismissing him from employment. Surely in light of this it cannot be said that Meyer has slept on his rights or

that the defendants have been surprised by the initiation of the subsequent civil rights action. Further, the defendants have never argued that they have been prejudiced, or that witnesses or evidence has been lost, as a result of the initiation of this civil rights action.

Lastly, Meyer's failure to initiate his federal action in the remaining eleven months following the denial of his application for leave to appeal by the New York Court of Appeals is of no legal consequence. For if the paramount considerations of federalism and providing an independent, supplemental forum to redress constitutional claims, prevails, then Meyer's Section 1983 action was timely commenced so long as the statute of limitations was tolled while he sought relief in the state courts.

V. CONCLUSION

For all of the reasons set forth above and in our papers previously submitted and on file with this Court, Walter J. Meyer earnestly prays that this petition be granted and the judgment appealed from should be reviewed by this Court sitting in banc.

Respectfully submitted,

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COURT OF APPEALS
SECOND CIRCUIT

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Defendants-Appellees.

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Affidavit of Service by Mail

STATE OF NEW YORK, COUNTY OF *ss.:*

I, Velma N. Howe, *being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at* 298 Macon Street, Brooklyn, New York 11216
That on the 27th *day of* January *1977, deponent served the annexed*

Suggestion for Rehearing

upon Wm. S. Norden-Deputy County Atty. *attorney(s) for*

in this action, at Executive Building
West Street
Mineola, N.Y. 11501

the address designated by said attorney(s) for that purpose by depositing a true copy of same, enclosed in a postpaid properly addressed wrapper in a Post Office Official Depository under the exclusive care and custody of the United States Post Office Department, within the State of New York.

Sworn to before me, this 27th
day of January, *1977.*

Velma N. Howe

Velma N. Howe

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